Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. DIAMOND, JR.
DIAMOND RASH GORDON
& JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277
Attorneys for
Ysleta del Sur Pueblo

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Eleventh Amendment bar the Pueblo's action against Texas for a declaration that federal law permits its gaming activities where "nothing is demanded from the state [and no] claim against it of any description is asserted or prosecuted?" See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 410 (1821).

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PETITION FOR A WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on August 5, 1999, Appendix at 1a to 2a. The Tribe's petition for rehearing was denied on September 7, 1999, Appendix at

3a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

Neither the opinion of the Fifth Circuit, Appendix at 1a to 2a, nor the Order on Motions to Dismiss of the United States District Court for the Western District of Texas, Appendix at 4a to 11a, are reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of any Foreign State.

25 U.S.C. § 1300g-6(a): All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.

STATEMENT OF THE CASE

The Pueblo sued the State of Texas and its governor seeking a declaration that the Pueblo's gaming activities on its reservation are not prohibited by the laws of the State of Texas and are permissible under the gaming provisions of its Restoration Act, 25 U.S.C. § 1300g-6(a). The district court dismissed the claim against the State, holding it barred by the Eleventh Amendment. Pursuant to 28 U.S.C. § 1291, the Pueblo appealed the dismissal.[1] The Fifth Circuit affirmed the dismissal for lack of standing and ripeness, issues not addressed by the parties.

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[1] The Pueblo also appealed the dismissal of its claim against the governor, but withdrew the appeal after briefing.

ARGUMENT

Citing only *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Fifth Circuit, in one sentence, raised and determined issues of standing and ripeness. Appendix at 2a. Without comment, the Fifth Circuit also denied the Pueblo's Petition for Rehearing. Appendix at 3a.

The Pueblo, alleging economic harm suffered due to the governor's untruthful statements to the press, sought a declaration of its federal right to conduct certain gaming activities. The Pueblo contended that *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) permits an action against a state for declaratory relief despite the Eleventh Amendment bar where "nothing is demanded from the state [and no] claim against it of any description is asserted or prosecuted." *Id.*, at 410. The Pueblo argued on appeal that such a case is not suit under the Eleventh Amendment. Brief of Plaintiff/Appellant, pp. 10-14. In response, the State questioned whether a case or controversy exists sufficient to confer jurisdiction where nothing is requested of the State. Brief of Appellee State of Texas, pp. 7-8.

Ripeness involves a substantial controversy, 13A C. Wright, A. Miller, & C. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984), and standing requires that a favorable decision will redress the injury underlying the controversy, *Lujan*, at 560. The Pueblo's contention —an action for declaration of federal rights is not a suit for Eleventh Amendment purposes—does not render the underlying controversy non-existent or non-redressable, unless one assumes that the State and its officials will not conduct themselves in accordance with a federal court's declaration of federal rights. Such an assumption impugns the dignity of the members of these United States.

The recent Eleventh Amendment decisions by this Court limiting the ability of the federal judiciary to vindi-

cate federal rights in suits involving states necessitate development of a judicial process such as this suit whereby the "dignity" of the sovereign states is respected while federal rights are vindicated.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

THOMAS M. DIAMOND, JR.
DIAMOND RASH GORDON
& JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277
Attorneys for
Ysleta del Sur Pueblo

APPENDIX

APPENDIX

[Filed Aug. 5, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50859
Summary Calendar

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant,

versus

GEORGE W. BUSH, JR.; STATE OF TEXAS,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. P-98-CV-47

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM: *

The Appellant, Ysleta del Sur Pueblo, appeals the district court's grant of Fed. R. Civ. P. 12(b)(6) motions

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

to dismiss on behalf of Texas Governor George W. Bush, Jr. and the State of Texas.

On May 3, 1999 the Appellant filed an unopposed motion to withdraw the appeal of the district court's order in favor of Governor George W. Bush, Jr. The Appellant's motion is GRANTED.

The remaining appeal seeks reversal of the district court's order in favor of the State of Texas. The Appellant seeks reversal so it can obtain a judicial declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, that the Appellant's gaming activities at its casino are in compliance with Texas law. The Appellant argues that the lower court erred in barring the Appellant's claim on Eleventh Amendment grounds.

We have reviewed the record and briefs filed by the parties and find that the Appellant has failed to meet its burden to establish the standing and ripeness requirements which are necessary to invoke this court's jurisdiction under Article III of the United States Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). We therefore affirm the district court's jurisdictional dismissal on an alternate ground. *See Esteves v. Brock*, 106 F.3d 674, 676 (5th Cir. 1997); *United States v. Real Property Located at 14301 Gateway Boulevard West, El Paso County Texas*, 123 F.3d 312, 313 (5th Cir. 1997).

AFFIRMED.

[Filed Sep. 7, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50859

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant

v.

GEORGE W. BUSH, JR.; STATE OF TEXAS,
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas, Pecos

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ James Dennis
United States Circuit Judge

[Filed Aug. 7, 1998]

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

P-98-CA-47

YSLETA DEL SUR PUEBLO

v.

GEORGE W. BUSH,
Individually and as Governor of Texas, &
THE STATE OF TEXAS
UNITED STATES OF AMERICA

ORDER ON MOTIONS TO DISMISS

BEFORE THE COURT, in the above-captioned cause of action, are Defendant Governor George W. Bush's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6), filed June 17, 1998, Defendant State of Texas' Rule 12(b)(6) Motion to Dismiss, filed June 17, 1998, the Plaintiff's Combined Response, filed June 30, 1998, and Defendant Governor Bush's Reply, filed July 24, 1998. After due consideration, the Court is of the opinion that the following Order is appropriate.

I. BACKGROUND

The Plaintiff, the Ysleta del Sur Pueblo ("Tribe") is a federally recognized Indian tribe. The Tribe owns and operates the Speaking Rock Casino and Entertainment Center which is located in El Paso, Texas.

The Tribe filed its Complaint on May 28, 1998, asserting the following allegations:

> That George W. Bush and his political agents are interfering with the federal legal rights of the Ysleta del Sur Pueblo given to it by a federal statute (25 U.S.C. § 1300g-6) through deceitful and untruthful statements to the press with respect to claimed illegal gaming activities at the Speaking Rock Casino and Entertainment Center. . . . That George W. Bush is taking these actions as an individual and as a candidate for political office in the guise of the Governor of the State of Texas, and is seeking to advance his national political career at the expense of stifling the legal rights of the Ysleta del Sur Pueblo. . . . That the Ysleta del Sur Pueblo is being harmed economically by such defamations and is being forced to direct its attention to defending itself from George W. Bush's improper actions and has subjected itself to legal expense and other expense in order to defend itself from his untrue charges.

Pl.'s Compl., at 2. The Tribe asks that the Defendants Governor Bush and the State of Texas be enjoined from interfering with its legal rights, and that Defendant Governor Bush pay damages as a result of his defamatory statements against the Tribe.

Defendant Governor Bush's Motion contends that the Tribe's claims should be dismissed because the Plaintiff has failed to state a claim upon which relief can be granted. More specifically, Defendant Governor Bush contends that the "Plaintiff erroneously urges that the Governor defamed the casino in press statements." *Def. Gov. Bush's Mot. To Dismiss*, at 3. Defendant Governor Bush further contends, however, that he is sovereignly and absolutely immune from suit absent waiver or consent.

Defendant State of Texas contends that the Tribe's suit should be dismissed for the simple reason because it is barred by the Eleventh Amendment immunity.

II. DISCUSSION

A. The Restoration Act

The Tribe asserts in its Response that its gaming activities at the Speaking Rock Casino and Entertainment Center are not prohibited by the laws of the State of Texas and are permissible under the Restoration Act. The Restoration Act established a method of determining whether the Tribe's proposed gaming activities are permissible under Texas law. The Restoration Act provides as follows:

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal prohibition penalties that are provided by the laws of the State of Texas.

25 U.S.C. § 1300g-6 (1998). The Fifth Circuit found in *Ysleta del Sur Pueblo v. State of Texas* that the Restoration Act governs the determination of "whether gaming activities proposed by the Ysleta del Sur Pueblo are allowed under Texas law, which functions as surrogate federal law." 36 F.3d 1325, 1335 (5th Cir. 1994).

B. State of Texas and Eleventh Amendment Immunity

The Tribe's suit is one for a declaratory judgment against the State of Texas in that the Tribe's casino activities are in full accord with Texas law and the Restoration Act. Essentially, the suit is one against the State of Texas (as well as the Governor of Texas). Alas, the inevitable

Eleventh Amendment immunity question enters into the discussion.

The Constitution of the United States provides the following:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or subjects of any Foreign State.

U.S. CONST. amend XI.

The plain language of the Eleventh Amendment prohibits suits in Federal court by citizens of one State against another State or by aliens against any State. In addition, the Supreme Court has construed the Amendment to prohibit suits against States by their own citizens. *See Hans v. Louisiana,* 134 U.S. 1 (1890); *Florida Dep't of States v. Treasure Salvors, Inc.,* 458 U.S. 670, 683 n.17 (1982). Furthermore, the Supreme Court has also construed the Amendment to prohibit suits against States by foreign States or sovereigns. *See Monaco v. Mississippi,* 292 U.S. 313, 330 (1933); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 778 (1991) (recognizing the sovereignty of Indian Tribes).[1]

The Eleventh Amendment bar to suits against States is bypassed, however, under the following circumstances:

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1 These constructions are based upon the following premises:

> the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by the sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, whether expressly or in the "plan of the convention."

Blatchford, 501 U.S. at 778.

(1) when the State has waived immunity and consented to the suit. *See Clark v. Barnard,* 108 U.S. 436, 447 (1883); *Edelman v. Jordan,* 415 U.S. 651, 673 (1974); *Papasan v. Allain,* 478 U.S. 265, 276 n.10 (1986); or

(2) when Congress has clearly expressed its intent to abrogate or limit that immunity through legislative authority. *See Quern v. Jordan,* 440 U.S. 332, 333-334 (1979); or

(3) when the suit is instituted under a fiction which allows suits for prospective injunctive relief against a State official in vindication of a federal right. *See Ex Parte Young,* 209 U.S. 123 (1908).

A State's waiver of its Eleventh Amendment immunity may be found "only where stated by the most express language or by such overwhelming implications from the text as [would] leave no room for any other reasonable construction." *Edelman,* 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.,* 213 U.S. 151, 171 (1909)); *see also Ex Parte State of New York,* 256 U.S. 490 (1921).

Congressional resolution to abrogate or limit a State's Eleventh Amendment immunity must be clear by "an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984) (quoting *Quern,* 440 U.S. at 342).

The *Ex Parte Young* exception allows suit against a State if the suit challenges the constitutionality of a State official's action. This is so because the suit could not be against the State —there would simply be no action on

the part of the State since there can be no authorization by the State of the unconstitutional acts of its officials. *Ex Parte Young*, 209 U.S. at 159-160.

A state's sovereign immunity under the broad stretch of the Eleventh Amendment includes immunity from certain suits brought by Indian Tribes. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Likewise, using the immunity defense to the fullest, the State of Texas has clearly raised this argument. The State has certainly not consented to this particular suit in federal court. Congress has not recently passed any enactments indicating that the Restoration Act abrogates the State's immunity. Therefore, the Motion to Dismiss by Defendant State of Texas is hereby granted based on Eleventh Amendment immunity.

C. Governor George W. Bush and Immunity

As Governor of the State of Texas, George W. Bush is bound to follow the Texas Constitution:

> He shall cause the laws to be faithfully executed and shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States.

TX. CONST. art. 4, § 10. Naturally, the State of Texas has laws governing the legality of any gaming activity within the State's borders. The Governor, therefore, has the duty of ensuring that these laws, as well as others, are not being violated. In pursuant of this honorable task, the Governor became concerned in late 1996 that the Speaking Rock Casino and Entertainment Center was engaged in illegal gambling activity. The Governor, in March of 1997 and again in 1998, voiced his concern to the Attorney General and requested that he investigate

and possible prosecute the use of illegal gambling devices at the Casino.

To date, the Court is unaware of any official outcome of the Governor's pursuit. It does not appear that the Attorney General has determined that the Casino is engaged in any illegal activity whatsoever. Furthermore, it does not appear that any charges have been or will be filed or that any investigation has begun against the Tribe and its Casino activities.

The Tribe, however, states in its Complaint that the Governor's actions and comments were not made in pursuit of law enforcement but that rather, they were made in furtherance of his national political career as an unannounced candidate for the President of the United States.

The Court, however, shall make a call in that it shall assume that Defendant Governor Bush was indeed faithfully acting as the Governor of Texas and not as an early Presidential candidate. Therefore, since the Court finds that he was simply doing his job as *Governor*, the Court finds that he is likewise immune from this particular suit. *See Nixon v. Fitzgerald*, 457 U.S. 731, 744-58 (1982) (stating that government officials are entitled to some form of immunity from suits arising from official acts). As to his defamatory statements directed towards the Tribe and its casino, the Governor is also immune for such statements in his letters to the Attorney General since the Court finds that they were related to his pursuit of law enforcement. Therefore, the Court shall grant the Governor's Motion to Dismiss the suit.

The Court does find as dicta, however, that in this honorable pursuit of faithful execution of the laws of Texas, it is not truly necessary for the head of Texas to voice his actions to the press, since it is not the press he

should be recruiting as help. "Our deeds determine us, as much as we determine our deeds." [2]

Accordingly,

IT IS ORDERED the Defendant Governor George W. Bush's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) is hereby GRANTED.

IT IS FURTHER ORDERED that Defendant State of Texas' Rule 12(b)(6) Motion to Dismiss Defendant's Motion to Dismiss is hereby GRANTED.

IT IS FINALLY ORDERED that any relief not granted herein is hereby denied.

SIGNED this 6 day of August, 1998.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D. BUNTON III
Senior U.S. District Judge

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[2] George Elliot, *Adam Bede* (1859) in THE QUOTABLE LAWYER 6 (David Shrager and Elizabeth Frost, eds., 1986).